No. 89-1322

In The

Supreme Court of the United States

October Term, 1990

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE, THE INTER-TRIBAL COUNCIL OF THE FIVE CIVILIZED TRIBES, IN SUPPORT OF RESPONDENT

Bob Rabon
Kile, Rabon & Wolf
114 North Second Street
Post Office Drawer 726
Hugo, Oklahoma 74743
(405) 326-6427

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

This brief amicus curiae is filed, in support of respondent, by the Inter-Tribal Council of the Five Civilized Tribes, with the consent of both parties.

INTEREST OF AMICUS CURIAE

Petitioner Tax Commission has advanced a broad, wide-ranging and unprecedented theory that trial sovereignty has been extinguished in Oklahoma. Consequently, it contends there is no Indian country left therein and that the state law has wholesale application to all Indian people, tribal governments and Tribal lands in Oklahoma. Moreover, petitioner contends that this Court should overrule long established precedent and find that congress lacks constitutional authority to shield Indian tribes from unconsented suits insofar as this Court has placed that interpretation on 18 U.S.C. § 1151.

The Inter-Tribal Council of the Five Civilized Tribes was organized on February 3, 1950, and is comprised of the Choctaw Nation of Oklahoma, the Cherokee Nation of Oklahoma, the Chickasaw Nation, the Seminole Nation of Oklahoma, and the Muscogee (Creek) Nation, which were removed to Oklahoma in the early nineteenth century under inauspicious circumstances which are now well known. See e.g. *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 622-626 (1970). These member tribes of the Inter-Tribal Council, are not only largest in Oklahoma but among the largest in the United States. Their combined membership exceeds 250,000 members.

Encouraged by the federal government, each of the Five Civilized Tribes exercise a broad range of self-governing powers within lands held in trust for them by the United States and are engaged in various forms of economic development activities which generate revenues used to provide tribal programs and services for their members. They do not request nor do they receive assistance from the State of Oklahoma in the furtherance of these activities. The tribal powers of self government and efforts at economic self-sufficiency by Indian tribes across the nation would be seriously undermined if this Court were to accept the legal arguments and factual assertions advanced by the Oklahoma Tax Commission in this case.

One member of the Inter-Tribal Council, the Chickasaw Nation, is presently engaged in litigation which is now pending before the Oklahoma Supreme Court. *State of Oklahoma, ex rel, Oklahoma Tax Commission v. Chickasaw Nation*, No. 73729. That litigation has already visited this Court on two occasions wherein petitioner made the same arguments as made here. In *Oklahoma Tax Commission v. Graham*, 108 S.Ct. 481 (1987) sub. nom. this Court reversed the Tenth Circuit Court of Appeals and remanded for reconsideration of whether the case was properly removed from the state district court in which the suit had been originally filed. On reconsideration the Circuit Court again found federal question removal jurisdiction present and affirmed dismissal of the state's complaint on the ground of tribal sovereign immunity from unconsented suit. 846 F.2d 1258. This Court, again reversed and ordered remand to the state court on the procedural question without addressing the substantive issue of sovereign immunity except to recognize it as a

defense, 109 S.Ct. 1519 (1989). On remand, the state district court, following this and every other federal Court's long established teachings, ordered the case dismissed on the ground the neither the Congress nor the the Chickasaw Nation had consented to the suit and that it was barred by sovereign immunity. The Tax Commission's appeal to the Oklahoma Supreme Court is pending. In that case, as in this one, the Tax Commission is arguing that Oklahoma state laws apply to tribal activities within "Indian country", 18 U.S.C. § 1151, because Indian county in Oklahoma is somehow different than Indian country in every other state. In other words it attempts to convince the Oklahoma Supreme Court that it should be allowed to play by a different set of rules than is required by its counterparts in other states. However, in the instant case, the Tax Commission is more ambitious because the relief sought is much broader and would sweep away tribal sovereignty of Indian tribes all across the nation.

Because the position urged by the petitioner virtually threatens the very existence of the tribal governments it represents, the Inter-Tribal Council has a substantial interest in opposing this attack on their sovereignty.

SUMMARY OF ARGUMENT

The State of Oklahoma's unprecedented history of antagonism to its Indian population is well documented. Most tribes in Oklahoma, forced from their ancient homelands east of the Mississippi River to a hostile, sometimes barren, land in the early nineteenth century began to carve out new lives for themselves pursuing historical

cultures and governing themselves under democratic forms of government modeled after that of the United States. But, seventy-five years later they were again visited by the dominant society's imperialistic and voracious appetite for land. Thus, began the individual allotment process under the guise of saving these Indian tribes from themselves and protecting them from unscrupulous white men. It proved to almost be a perfect bloodless destruction of these peoples as organized societies. However, what was left unsaid but understood by all is that these Indian people had no concept of individual ownership of land nor any concept of its value to them as an individual. In a few short years, with the shameful assistance of the Oklahoma state court system approving purchases of individual allotments for sums tantamount to outright theft, permitting white men to purchase lands allotted to orphaned children over whom they had been appointed guardians and other such unsavory practices, this once proud Indian population was virtually without any land base.

Yet, for many years these tenacious peoples continued to cling to their cultures, for the most part ignored by the dominant society, particularly Oklahoma's state government, until more recently when the federal government began to assist them in restoring their shambled governments and promoting economic development. While these tribes have begun to prosper and enter the mainstream of commerce under these federal policies, greatly improving the lives of their people, they have also rekindled the fires of antagonism of Oklahoma's state government that had been smoldering embers for so many years. It being the accepted nature of the bureaucracy to want to tax and regulate everything and

everybody, various agencies of the state have embarked on a program to reduce tribal governments to mere social organizations completely under state domination. But for the federal judiciary their mission would have, by now, been successful.

Amicus, in support of respondent, will resist the tax commission's extraordinary claim that no Indian country exists in Oklahoma; that sovereign immunities should be judicially abolished; that "the sovereignty doctrine is not useful this day"; that the "correct approach is to strike down the Tribe's immunity defense" when it is asserted against state taxation and regulation. (Pet. Br. 6, 29) Further, amicus rejects the tax commission's characterization of the Dawes Commission efforts as "statesmanship"; its unflattering reference to tribal economic development as being "with the singular ambition of fulfilling its [the tribes'] lust for lucre"[1] and its belittling, cavalier description of the respondent tribe as "merely a defeasible vestige of history." (Pet. Br. 32, 33, 39)

Further, amicus will resist the tax commission's argument, its irrelevance aside, that the historical reservation boundaries of most Oklahoma tribes have been abolished by congress. In any event, that issue is immaterial because the standard for allocating tribal, federal vis-a-vis state jurisdiction for purposes of taxation and regulation is now governed by the more modern criteria of whether the lands are "Indian country" as defined by

---

[1] This brings to mind the old adage of the pot calling the kettle black in light of petitioner's attempt to gain entry to the Potawatomies' treasury for almost three million dollars.

decisions of this Court and acts of congress. Moreover, it will be shown that tribal sovereign immunity from unconsented suit is essential to tribal autonomy and the federal trust relation and is a settled principle independent of geographical considerations. Amicus also believes that because such considerations are exclusively within the plenary powers of the legislature the issue of tribal immunity from suit and taxation is a non-justiciable political question.

Finally, amicus will assert that the tax commissions' counterclaim was appropriately dismissed and its attempts to apply Oklahoma's state taxes against the tribe was properly enjoined.

ARGUMENT

I. NOTWITHSTANDING ITS LACK OF RELEVANCE TO SOVEREIGN IMMUNITY PETITIONER'S RESERVATION DISESTABLISHMENT ARGUMENT IS WITHOUT MERIT

Relying on an antiquated concept of the term "reservation" from a century ago rather than modern day definition of state versus federal-tribal jurisdictional allocations governed by whether a particular area is "Indian country", petitioner asserts the novel, indeed lonely, theory that there are no tribal lands in Oklahoma over which the state does not have authority.[2]

[2] Under this theory Oklahoma's Indian tribes would not be the only tribes subjected to state jurisdiction. There are many tribes in other states whose lands have been allotted in severalty and historical reservation settled by non-Indians.

Petitioner's sweeping proposition to limit tribal sovereign immunity from state laws and unconsented suit based on territorial or geographical considerations is absolutely without precedent. This labored effort is aimed at bringing this matter within the ambit of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), a case that neither involved Indian country as defined by 18 U.S.C. §1151 or where sovereign immunity from suit was at issue.

A. Respondent's Reservation Boundaries Have Not Been Abolished

While most, if not all, reservations, as that term was perceived before the turn of the century, in Oklahoma have been significantly diminished by acts of congress and the allotment process only the boundaries of the Ponca and Otoe and Missouri have been explicitly abolished. 33 Stat. 218.[3] After the passage of the General Allotment Act of 1887 [also known as "The Dawes Act", 24 Stat. 388] congress provided for allotments with the surplus to be sold to settlers. 26 Stat. 1016. There was, however, reserved "any land heretofore set apart in said tract of country for any use by the United States, or for school, school farm or religious purposes" that was not allotted or sold. The lands on which the activities that precipitated this litigation is a part of those lands reserved.

[3] Provides that "the reservation lines of the said Ponca and Otoe and Missouri Indian reservations be, and the same are hereby, abolished."

It is true that the United States government during the assimilationist period engaged in a policy leading to termination of Indian tribes. However, as has been noted by most historians and scholars, this was a sad period in American history and is a poor background on which to ask this Court to revisit those policies on Indian tribes and to extract such vital aspects of their well-recognized sovereignty.

The Tax Commission relies heavily on the reports filed by the Dawes Commission, which, of course, had nothing to do with respondent's lands, as proof that congress intended to abolish all Indian reservations in Oklahoma. It states that these reports give "an accurate first-hand account of the conditions existing throughout the Indian Territory" (Pet.Br. at p.14) which "form a basis to develop an understanding" that congress intended by the allotment process to abolish the Oklahoma reservations. It further allows how the "statesmanship" practiced by the Dawes Commission "dismantled" tribal sovereignty which should come to quite a surprise to most courts. (Pet.Br. at p.39)

Amicus suggests that a more vivid illustration of the Dawes effort is provided by the noted Indian scholar and author, Angie Debo, in her critically acclaimed book, *And Still the Waters Run*, Princeton (1940) at page 91:

> " . . . As the federal officials began to realize the vast helplessness and inexperience of the average Indian, they began, through a blundering process of experimentation, to try to guard his property. But because of the lack of a definite and constructive policy, and most of all because the inherent difficulty of the task itself, the general effect of allotment was an orgy of plunder

> and exploitation probably unparalleled in american history."

Another leading Indian scholar, historian and author of the times commented on the reports of the Dawes Commission that claimed it was the fault of the Indians and their "non-American" (Pet.Br. at p.15) system that necessitated the break-up of the reservations. James H. Malone, *The Chickasaw Nation*, John P. Morton & Co. (1922):

> "The truth is that when the Five Civilized Tribes were driven from their ancient homes east of the Mississippi to make room for the early settlers, the country selected for them, and called the Indian Territory, was thought to be a wild and barren country and was then subject to the inroads of the wild roving bands of the plain Indians, making life there insecure. After these savages were conquered and the country made secure and habitable by the Five Civilized Tribes, not only the great agricultural possibilities of the country became a striking fact, but, in addition, vast deposits of coal, oil, and gas were discovered. Then it was that, whetted by cupidity, the whites became as hungry wolves, seeking all they could devour, and intruders overran the Indian country, while the United States, which acknowledged the helplessness of the Indians, and its duty by treaty and morally to exclude the intruders, with the power so to do, quietly looked on and did nothing. Hence the Dawes Commission."

Angie Debo, also commented on the credibility of the Dawes Commission in her work, *A History of the Indians of the United States*, University of Oklahoma Press, (1970) at page 307:

> "It published annual reports, and its members testified before congressional committees and

> made speeches throughout the United States. These statements accurately depicted the inconveniences of the white population, but flagrantly misrepresented the condition and sentiments of the Indians and in a high moral tone urged the abolition of their institutions as a deliverance to them. Greed, philanthropy, and public opinion were thus united to break down the tribes' defenses. What might have been advocated as a measure of cold-blooded realism was represented a holy crusade."

Respondent agrees that the courts look to legislative history to ascertain congressional intent to disestablish a reservation, but it must be remembered that the Dawes reports, to which petitioner refers, are not congressional committee reports. They are simply reports of a commission established to further the assimilationist policies of the times by persuading the tribes to allot their lands in severalty and thereafter implement the allotment process. More importantly it should not go unnoticed that petitioner is unable to cite a single congressional act in which the Congress explicitly disestablished the Potawatomies reservation boundaries. This Court in *Solem v. Batlett*, 465 U.S. 463, 470 (1984) reiterated the rule that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise". (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909) simply allotting the lands out in individual plots within the area does not change it's reservation character.

A study of the legislation resulting in allotment of the Potowatomi lands finds no expression on the part of Congress to disestablish the tribe's reservation. The tribe

continues today, to own and occupy surplus lands that were not sold. There is no doubt that the sales of surplus land was not for the purpose of facilitating non-Indian settlement on the reservation but that does not manifest congressional intent to disestablish it. The dealings with the Potawatomies were akin to the situation in *Mattz v. Arnett*, 412 U.S. 481 (1973) where the Court held that an Act opening lands for settlement, allotting lands to tribal members and sale of the surplus for an undisclosed sum to be deposited for the tribes benefit did not evidence an intent to terminate the reservation status of the entire area. It cannot be denied that members of Congress at the time of the allotment process probably thought that this would eventually terminate tribal existence. But, as this Court said in *Solem* at 468, "the Congresses that passed the Surplus Land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process. We have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations . . . "

A few years later the country began to take a dim view of these former termination and assimilationist policies. The advent of a new policy, came with the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. §501 et seq. The OIWA stopped the allotment of Oklahoma's Indian lands and allowed the tribes to reorganize their shambled governments. Whatever the Congress might have done earlier the notion of Oklahoma being an "Assimilated state" was laid to rest in 1936.

B. Tribal Trust Land In Oklahoma Is "Indian Country" Over Which The State Does Not Generally Have Jurisdiction

This Court does not have to decide whether the original Potawatomi reservation in Oklahoma has been disestablished or whether its boundaries have been abolished. Whether conduct of Indians has occurred on "Indian country" has increasingly become the benchmark for allocation of federal, tribal, and state civil and criminal jurisdiction. *California v. Cabazon Band Indians*, 107 S.Ct. 1083, 1087 & N.5 (1987); *DeCoteau v. District County Court*, 420 U.S. 421, 427-428 & N.2 (1971) *Indian Country, U.S.A. Inc. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987) Cert. Den. sub nom *Oklahoma Tax Comm. v. Muscogee (Creek) Nation*, 108 S.Ct. 2870 (1988). See also F. Cohn, Handbook of Federal Indian Law 5-8 (1942). Congress has defined "Indian country" for purposes of determining federal criminal jurisdiction in 18 U.S.C. §1511(a)(1982) to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . " The Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. §1903(10) provides:

> "Reservation means Indian country as defined in section 1151 of title 18 and any lands, not covered under such action, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;"

On September 26, 1988, the Congress passed Senate Bill 555, Indian Gaming Regulatory Act, 25 U.S.C. §2701 et

seq. Section 2703(4)(b) of the Act defines "Indian lands" for tribal and federal jurisdictional purposes as:

> "Any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual . . . and over which an Indian tribe exercises governmental power.

This Court has designated lands as "Indian country" where title was held in a variety of ways. *United States v. Pelican*, 232 U.S. 442, 449 (1914); *United States v. McGowan*, 302 U.S. 535, 538-539 (1938); *United States v. Chavez*, 290 U.S. 357, 364 (1933); *United States v. John*, 437 U.S. 634, 649 (1978). The principal test applied by the courts is found in *Pelican* at 439, i.e. tribally-owned lands "devoted to Indian occupancy . . . validly set apart for the use of Indians." This includes lands held in trust for a tribe by the United States. *John* at 649. This is also the test applied in at least four Circuits. *United States v. Sohappy*, 770 F.2d 816, 822-823 (9th Cir. 1985); *Langly v. Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985); *United States v. Agure*, 801 F.2d 336 (8th Cir. 1986); *Cheyenne-Arapaho Tribes v. State of Oklahoma*, 618 F.2d 665, 667-668 (10th Cir. 1980); See also *State of Washington v. Sohappy*, 757 P.2d 509, 511 (Wash. 1988); and, *May*, supra at 82.

The Petitioner apparently made the same argument to the Circuit Court in *Indian Country, U.S.A.*, supra, that it does here, i.e. the Creek Nation reservation had been disestablished. The Court there said at 975 N.3:

> "The State seems to believe that the Indian country status of the Mackey site rests on whether the exterior boundaries of the 1866 Creek reservation have been disestablished. It does not . . . *Tribal lands, trust lands, and certain allotted lands generally remain Indian country*

despite disestablishment. (emphasis supplied) See, e.g., *Solem*, 465 U.S. at 467 n.8, 104 S.Ct. at 1164 n.8; *DeCoteau*, 420 U.S. at 428, 95 S.Ct. at 1085.

The terms "reservation" and "Indian country" are used interchangeably by the Congress and the courts. The primary meaning of both terms is to describe "federally-protected Indian tribal lands". Cohen's Handbook of Federal Indian Law (R. Strickland Ed. 1982) at 35 n.66. Thus, the terms "Indian country" and "reservation" have come to mean "those lands which congress has set apart for tribal and federal jurisdiction". *Indian Country, U.S.A.* at 973. It should be noted that the Oklahoma Supreme Court has also recognized the importance of this classification:

> "The touchstone for allocating authority among the various governments has been the concept of 'Indian country', a legal term delineating the territorial boundaries of federal, state, and tribal jurisdiction. Historically, the conduct of Indians and interests in Indian property within Indian country have been matters of federal and tribal concern. Outside Indian country, state jurisdiction has obtained."

Ahboah v. Housing Authority of the Kiowa Tribe, 660 P.2d 625, 627 (Okl. 1983). See also *State v. Burnett*, 671 P.2d 1163 (Okl. Cr. 1983).

Here, the property on which the respondent conducts its business was conveyed by the Pottawatomies to and accepted by the United States in trust. (JA 16) This was done for reasons that should be obvious. It was the intent of both the Tribe and the United States that this tract of land would be removed from the jurisdiction of the State of Oklahoma. The Petitioner has had much difficulty in accepting this but as the Court said in *Oneida*, at 678:

> "There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians."

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), on which petitioner contends is controlling, when coupled with the obiter dicta found in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), should not be applied here for several reasons. First, sovereign immunity from suit was not at issue in either case. Secondly, the leased lands involved in *Mescalero* were located outside tribe's recognized reservation. The Tribe's convenience store in this case is located within the exterior boundaries of its original reservation, and the territorial boundaries for its present day government which have been approved by the Department of the Interior. Third, New Mexico's Enabling Act makes a distinction between on and off reservation activities for taxing Indian tribes. *Mescalero* at 149-150. Oklahoma's Enabling Act has no such provision. Congress expressly granted New Mexico more powers over Indians than it did Oklahoma. Oklahoma's authority is restricted to the power given it by federal common law. The issue there was whether the area was on or off a "reservation" not "Indian country". The term "reservation" was used in a different context in New Mexico's enabling legislation than it is used today. Finally, as will hereinafter be more fully discussed, whether the Potowatomies are immune from suit does not depend, in any event, on whether they are engaged in activities on trust lands, Indian country or a reservation. Suit immunity is an attribute of sovereignty not dependent on geography.

II. THE CIRCUIT COURT'S DECISION BARRING THE TAX COMMISSION'S COUNTERCLAIM WAS SUPPORTED BY LONG ESTABLISHED PRECEDENT AND PUBLIC POLICY WHICH SHOULD NOT BE DISTURBED

A. Tribal Sovereign Immunity From Suit Is Deeply Rooted In American Jurisprudence

That this Court has been unwavering in its long-standing rule requiring an unequivocal waiver of sovereign immunity from suit by Congress before any court can be said to have jurisdiction over an Indian tribe is incapable of challenge. *Turner v. United States*, 248 U.S. 354 (1919); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Puyallup Tribe v. Dept. of Game of the State of Washington*, 433 U.S. 165 (1977); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986). The rule applies with equal force where the tribe initiates the litigation and a counterclaim is asserted. *United States Fidelity & Guaranty* at 513. In *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985) California's petition for certiorari's four "questions presented" included an objection to the lower courts' barring its counterclaim for taxes on the grounds that there was not effective waiver of the tribe's sovereign immunity from unconsented suit. Noticeably determining that the issue of sovereign immunity from suit was settled, this Court granted the petition on three questions but declined to do so on the suit immunity question. (See Petition for Certiorari, No. 85-130)

Here, the Tax Commission brazenly says to the Court that "the correct approach is to strike down tribe's

immunity defense". (Pet.Br. at p.29) and on the next page it claims it "recognizes the tribe's right to govern itself . . . ". There can be no credible attempt at reconciling these two statements. If the states are permitted to apply their laws to Indian tribes on Indian country and coercively enforce them in the courts the tribes would govern nothing and would be governed by the states. Indian tribes would be reduced to nothing more than social clubs.

In its zeal for complete and total dominance over Indian tribes in Oklahoma, the state unabashedly asks this Court to not only contradict its own well reasoned pronouncements in the decisions heretofore cited but to act in an area the Court has conceded, time and time again, it has absolutely no authority whatsoever. The Court has said "It is for congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of congress." *Celestine*, supra, 215 U.S. at 290. Regarding tribal sovereignty the Court has declared "Until congress acts, the tribes retain their existing sovereign powers." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Referencing the Choctaw and Chickasaw Nations the Court in *United States Fidelity & Guaranty* at 512 said "These Indian Nations are exempt from suit without congressional authorization." If any embellishment regarding this categorical proposition were necessary, the Court provided it in its interpretation of the holding of *United States Fidelity & Guaranty*: "We held [there] that the earlier judgment was void in the absence of congressional authorization for a suit . . . " *Puyallup*, 433 U.S. at 172 N.10. In *Three Affiliated Tribes* the Court expressly taking

cognizance of "congress' jealous regard for Indian self-governance," 476 U.S. at 890, and concluded that "[t]he common law sovereign immunity possessed by the tribe is a necessary corollary to Indian sovereignty and self-governance." On this basis, it then reaffirmed – if further reaffirmation were needed that "in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the states." Id. at 891.

This Court has also previously addressed the Tax Commission's overstated concerns of state financial ruin at the hands of Indian tribes in *Creek County v. Seber*, 318 U.S. 705, 718 (1943). There, in reference to certain Indian tax exemptions the Court said "the fact that the acts . . . may possibly embarrass the finances of a state or one of its subdivisions is for the consideration of congress."

Moreover, should this Court adopt the tax commission's position and "strike down" tribal immunity from suit much confusion between the legislature and judicial branches would ensue. This Court has not only concede the Congress' unqualified authority in the field of Indian sovereignty but the Congress has demonstrated that it likewise believes it to be one of its perogatives. Although it has not done so often, the Congress has not only shown that it knows how to abrogate tribal immunities when it is disposed to do so but, in the exercise of its trust responsibility, does so with great selectivity and care. See e.g. Act of June 28, 1898 §2, 30 Stat. 495 (held to be a *limited* abrogation of tribal sovereign immunity in *Adams v. Murphy*, 165 F. 304 (8th Cir. 1908); Act of April 26, 1906 §18, 34 Stat. 137, 144, (held to be *limited* abrogation of

immunity in *United States Fidelity & Guaranty*, supra at 513; allowing certain counterclaims to be asserted against tribes in Oklahoma federal courts); Public Law 93-195, 87 Stat. 769 (1923) (limited waiver of immunity to allow Choctaw, Cherokee and Chickasaw tribes to sue each other over the Arkansas Riverbed); Indian Civil Rights Act of 1968, 25 U.S.C. §1301-1303 (limited grant of jurisdiction only allowing habeas corpus relief). And, it has clearly warned when it did not intend for its legislation to be misapplied to confer jurisdiction over Indian tribes. Indian Self-Determination Act, 25 U.S.C. §450(N) providing "nothing in this Act shall be construed as affecting, modifying, diminishing, or otherwise impairing the immunity from suit enjoyed by an Indian tribe."; H.R. 13329, 95th Cong. 2nd Sess. (1978) (Proposal for wholesale diminution of tribal sovereignty rejected by Congress). Moreover, only this past year, Congress remained under the preception that it exercised complete dominion over tribal immunities. See, e.g. SB 517, 101st Cong., 1st Sess. (1989), introduced by Senator Orin Hatch, which would waive sovereign immunity as to any claim under the Indian Civil Rights Act.

B. Sovereign Immunity Is Essential To Tribal Automony, Self-Governance And The Federal Trust Relationship

The Trust Relationship between the federal government and Indian tribes was first recognized by this Court in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) where Chief Justice Marshall described the tribes as being "in a state of pupilege; their relation to the United States resembles that of a ward to his guardian. They look to our

government for protection; rely upon its kindness and its power; . . . " In *United States v. Kagama*, 118 U.S. 375 (1886) the Court addressing Congress' authority to impose the major crimes act on Indian Country said:

> "These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent largely for their political rights. They owe no allegiance to the states, and received from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises a duty of protection, *and with it the power*. This has always been recognized by the executive and by congress, and by this Court, whenever the question has arisen." (emphasis supplied).

Later, in *United States v. Sandoval*, 231 U.S. 28, 46 (1913) the Court, after a "careful review" of prior decisions, stated:

> "Taking these decisions together, it may be taken as the settled doctrine of this Court that Congress, in pursuance of the long established policy of the government, *has the right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body and not the Court*, to determine when the true interest of the Indian require his release from [the guardianship]". (emphasis added)

The trust responsibility and relat' nship with the federal government "is one of the primary cornerstones of Indian Law". F. Cohen, Handbook of Federal Indian Law, 220-221 (1982 Ed.)

The Court in *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981), speaking through Judge Anthony Kennedy, said:

> "Indian tribes enjoy immunity because they are sovereign predating the constitution, immunity is thought necessary to perserve autonomous tribal existence." (emphasis supplied)

In exercise of its trust responsibility the federal government has vigorously promoted tribal self-governance, automony and self-determination. This policy, pursued under the federal government's plenary authority over tribal affairs, could easily be frustrated if the tribes were made subject to state laws and the jurisdiction of state or federal courts to coercively enforce them. Further, it this Court should "strike down" tribal immunity limited tribal resources would soon be diminished. *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 376 (8th Cir. 1895).

C. Tribal Immunity From Suit Is Not Dependent Upon Geographical Considerations

The tax commission has devoted a substantial portion of its brief in pursuit of its odd theory that no Indian country exists in Oklahoma, that by reason thereof no tribal immunities prevail and that state government and the courts are free to assert jurisdiction over tribal governments, the absence of Congressional or tribal consent notwithstanding. Amicus submits that such argument is immaterial. This Court has never said that tribal immunity from unconsented suit is dependent upon where the cause of action arose. See e.g. *Puyallup*, supra, at 173 where the Court vacated the state court's restraining

order entirely as it applied to the Tribe's conduct both on and off its reservation.

The courts of Arizona, which as a large Indian population with tribes who are very active in both proprietary and governmental functions both off and on their reservation routinely hold that immunity is not governed by geographical considerations. *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421, 423-424 (Ariz. 1968); *S. Unique v. Gila River Pim-Maricopa*, 674 P.2d 1376, 1379 (Ariz. App. 1983); *Val/Del, Inc. v. Superior Court*, 703 P.2d 502, 507 (Ariz. App. 1985); *Dixon v. Picopa Const. Co.*, 755 P.2d 421 (Ariz. App. 1987).

D. Determination Of The Continued Viability Of Tribal Sovereign Immunity From Suit Is For The Congress And Is Therefore A Non-Justiciable Political Question

While this Court has seldom rejected the justiciability of an issue on political question grounds and, in fact, has routinely upheld tribal suit immunity on the merits (see supra at 17) amicus nevertheless suggests that it is an issue for which such determination is appropriate.

To be a proper subject for adjudication by a court, a controversy must also be justiciable – that is, appropriate for judicial inquiry or adjudgment. A controversy is not justiciable if it exclusively or predominately involves political questions the determination of which is a perogative of the legislative or the executive branch of the government. In *Baker v. Carr*, 369 U.S. 186, 211 (1962) the court reviewed its past precedents in order "to infer from them the analytical threads which make up the political

question doctrine." The Court said "[p]rominate on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government." Id. at 217. One of the threads it exhausted concerned "[t]he status of Indian tribes." Id. at 215.

In *Atkinson v. Haldane*, 569 P.2d 151, 162 (Alaska 1977) the Alaskan Supreme Court in a decision that is a model for scholarliness reaffirmed tribal immunity and found "merit in petitioner's further argument that *what is at issue here is essentially a political question* and this Court should adhere to the principle that political questions are not justiciable." (emphasis supplied).

The tax commission is asking this Court to take hold of this issue and "strike down" tribal immunity when the Court's authority to act simply cannot be reconciled with it unwaivering pronoucements that the power to do so is in the plenary power of Congress. Supra at 18. These decisions do not qualify Congressional authority on whether tribal members live on reservations, or have or have not been assimilated into the dominate society or are engaged in a propriatary as opposed to governmental function, or as subject to an infringement preemption balancing test. This court and legions hundreds of others have simply said such authority of the Congress is plenary.[4] What the tax commission seeks is to short-circuit the

---

[4] The Oklahoma Supreme Court has defined the term "plenary" to mean "full, entire, complete absolute, perfect and

(Continued on following page)

system by attempting to get this Court to do what Congress has thus far declined to do. Moreover, it does so without even having attempted to have Congress act. If the tax commission wants tribal immunities abolished as the "correct approach" (Pet. Br. at p.29) to its dilemma then it should lobby the Congress as others are required to do when a problem requires their attention.

E. The Tax Commission's Argument Below That Its Counterclaim Is Mandated By Rule 13(a), Federal Rules Of Civil Procedure, And Proper Under The Doctrine Of Recoupment Is Unpersuasive And Incorrect.

Petitioner argued below that its counterclaim was proper under Rule 13(a), Federal Rules of Civil Procedure and the doctrine of recoupment. Even though petitioner has apparently abandoned these theories since it makes no mention of them in its brief, amicus believes it should address these claims.

The court in *California State Board of Equalization v. Chemehuevi Indian Tribe*, 757 F.2d 1047, 1053 (1985), found that Rule 13(a) does not rise to the level of a Congressional waiver of tribal sovereign immunity:

> "[T]he compulsory counterclaim requirement of Rule 13(a) of the Federal Rules of Civil Procedure cannot be viewed as a congressional waiver of the Tribe's immunity . . . Rule 13(a) is explicitly intended to require joinder of only those claims that might otherwise be brought separately . . . nor can we read Rule 13(a) in

---

(Continued from previous page)

unqualified." *Mashunkashey v. Mashunkashey*, 134 P.2d 976, 979 (Okl. 1942).

> isolation and extend federal jurisdiction despite the repeated specification that the rules are not intended to have such an effect."

This Court has held that recoupment against a sovereign is a defense to all or a part of the sovereign's suit but does not give a defendant any right to affirmative relief. *United States v. Shaw*, 309 U.S. 502, 504 (1940). The respondent did not ask for damages or declaratory relief in its action injunction. Yet, the trial court granted the tax commission affirmative relief in the form of a declaratory judgment. The circuit court correctly reversed.

III. THE TAX COMMISSION'S ATTEMPT TO ASSESS ITS SALES TAXES AGAINST THE TRIBE IS UNAUTHORIZED AND WAS PROPERLY ENJOINED

Petitioner relies on *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980) to pursue its claim assessing the tribe for an alleged $2,691,470.00 tax liability.[5] (Pet. Br. at p.3) Neither of these decisions authorize application of uncollected taxes to the tribe which is the relief sought by petitioner. It readily admits that if this Court should decide "the holding *United States Fidelity & Guaranty* must be abandoned . . . *the tribe* will be exposed to millions of dollars of delinquent tax liability." (emphasis added)

---

[5] Amicus believes that this figure is preposturously exaggerated. It is doubtful the total gross sales receipts from cigarettes are more than a fraction of this amount much less the sales having taxes of that sum.

The taxes sought to be collected from the tribe clearly arises out of activities engaged in on Indian country over which Oklahoma has no jurisdiction. The prohibiting enforcement of these taxes is settled. In *Mescalero Apache*, supra, this Court said:

> " . . . in the special area of state taxation, absent cession of jurisdiction or other federal statutes, permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation and *McClanahan v. Arizona State Tax Comm'n*, supra, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." 411 U.S. at 148.

This Court has adopted a "per se rule" – in the special area of state taxation of Indian tribes and tribal members. *California v. Cabazon Band of Indians*, 480 U.S. ___, 94 L.Ed.2d 244, 258 F/N 17. The exemption of Indian tribes" from state taxes is lifted only when Congress had made its intention to do so unmistakably clear." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985).

The tax commission has been unable, indeed not even attempted, to cite a single Congressional act which would condone its attempted assessment. The injunction should stand.

CONCLUSION

The land over which the tax commission seeks to assert its authority is clearly "Indian country" as defined by this Court and the Congress. It is well established that state laws do not apply to activities on such land. Further, it is fundamental that the state may not tax an Indian tribe directly as the Oklahoma Tax Commission attempts to do here and it has offered no persuasive or valid authority to do so. Its request that this Court ignore the perogatives of the Congress in determination of when Indian tribes will be taxed by the states and subjected to unconsented jurisdiction of the courts is incredible and defies long settled principles enunciated by this Court. Having made no effort to seek relief in the proper forum, the United States Congress, the tax commission attempts to circumvent the system by asking this Court to do what it has repeatedly acknowledged was beyond its constitutional authority. Its request should be rejected and the circuit court's decision affirmed.

Respectfully submitted,

Bob Rabon
Kile, Rabon & Wolf
114 North Second Street
Post Office Drawer 726
Hugo, Oklahoma 74743
(405) 326-6427

Attorneys for Amicus Curiae